Supreme Court, U.S.
FILED

941416 FEB 21 1995

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

STEPHANIE S. SMITH,

Petitioner,

vs.

STRATUS COMPUTER, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE M. JOHNSON
Counsel of Record
ANN E. JOHNSTON
FORDHAM & STARRETT, P.C.
Attorneys for Petitioner
260 Franklin Street
Boston, Massachusetts 02110
(617) 439-0300

6355
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

60 pp

QUESTION PRESENTED FOR REVIEW

Whether a plaintiff who alleges disparate treatment in an action brought pursuant to Title VII of the Civil Rights Act of 1964, (42 U.S.C. ss 2000e et seq.) as amended, can prevail against an employer's motion for summary judgment by proffering evidence sufficient to permit a finding that the employer's articulated non-discriminatory reason for the employment action was a pretext, but without presenting additional affirmative evidence that the employer's action was actually motivated by an intent to discriminate.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	iii
Opinions Below	1
Jurisdiction	1
Statutory Provision Involved	1
Statement	1
Reasons for Granting the Petition	10
I. The Court of Appeals' interpretation of *Hicks* conflicts with the interpretation by other circuits and exacerbates an existing conflict of authority.	11
A. Majority Position	12
B. Minority Position	17
II. The First Circuit's decision is erroneous and the majority position is more consistent with the purposes behind Federal Rule of Civil Procedure 56 and the *McDonnell-Douglas/Burdine/Hicks* framework.	20

Contents

Page

III. Importance of the question presented. 25

Conclusion 28

TABLE OF CITATIONS

Cases Cited:

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 13, 15

Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993) 17, 19

Chambers v. TRM Copy Centers Corporation, 1994 WL 707278 (2nd Cir. 1994) 12

Dhuria v. Trustees of the University of the District of Columbia, 827 F. Supp. 8181 (D.D.C. 1993) 17, 18

Durham v. Xerox Corporation, 18 F.3d 836 (10th Cir.), *cert. den.*, 115 S. Ct. 80 (1994) 13, 15

Equal Employment Opportunity Commission v. Bailey Ford, Inc., 26 F.3d 570 (5th Cir. 1994) 18

Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994) 13

Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir.), *cert. den.*, 115 S. Ct. 355 (1994) 13

Contents

Page

Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913 (11th Cir. 1993) 14

Kline v. Tennessee Valley Authority, 1 F.3d 1241 (6th Cir. 1993) 13

Manzer v. Diamond Shamrock Chemicals Company, 29 F.3d 1078 (6th Cir. 1994) 14

McDonnell Douglas v. Green, 93 S. Ct. 1817 (1973) 2, 3, 13, 20, 23, 25

Mitchell v. Data General Corporation, 12 F.3d 1310 (4th Cir. 1993) 13, 15

Sempier v. Johnson & Higgins, 1995 WL 3408 (3rd Cir. N.J.) 14, 26, 27

St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993), citing the decision of the appeals court below, 970 F.2d 487 (8th Cir. 1992) ..... *passim*

Texas Department of Community Affairs v. Burdine, 101 S. Ct. 1089 (1981) 3, 20, 23, 25

Washington v. Garrett, III, 10 F.2d 1421 (9th Cir. 1993) 13, 15, 16

Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) 6, 8, 9, 15, 17, 18, 22, 23

Contents

Page

Statutes Cited:

28 U.S.C. § 1331 2

28 U.S.C. § 1343(a)(4) 2

42 U.S.C. § 2000e, *et seq.* i

42 U.S.C. § 2000e-2(a)(1) 1, 2

42 U.S.C. § 2000e-5(f) 2

Rule Cited:

Federal Rule of Civil Procedure 56 2

Other Authority Cited:

Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment,* 69 Notre Dame L. Rev. 1251 (1994) 11

APPENDIX

Appendix A — Opinion Below 1a

Appendix B — Opinion of the District Court (Excerpt from Transcript of Hearing on Motion for Summary Judgment) 20a

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App A., infra, 1a-19a) is reported at 40 F.3d 11. The oral opinion of the United States District Court for the District of Massachusetts (App. B., infra, 20a-26a) is unreported.

JURISDICTION

The Judgment of the United States Court of Appeals for the First Circuit was entered on November 22, 1994 (App. A., infra, 1a-19a). The jurisdiction of this Court is invoked pursuant to 28, U.S.C. Sec. 1254(1).

STATUTORY PROVISION INVOLVED

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 78 Stat. 255 (42 U.S.C. Sec. 2000e-2(a)(1), provides, in relevant part, that "[i]t shall be an unlawful employment practice for an employer -(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin...."

STATEMENT

Petitioner, Stephanie S. Smith sued Respondent, Stratus Computer, Inc., on January 13, 1992 in the District Court for the District of Massachusetts. Petitioner alleged that she was discriminated against upon the basis of her

sex by Stratus with respect to the termination of her employment. Federal jurisdiction of the case existed pursuant to 42 U.S.C. § 2000e-2(a)(1) and 2000e-5(f) and 28 U.S.C. § 1331 and 1343(a)(4). Stratus moved for summary judgment and the District Court granted the motion.

Petitioner appealed the grant of summary judgment on the ground that the District Court had erred in its interpretation of the requirement of proof established by this Court in St. Mary's Honor Center v. Hicks[1] and in the proper application of that requirement in determining a motion for summary judgment. The United States Court of Appeals for the First Circuit affirmed the decision and approved the requirement of proof applied by the district court and its application in granting summary judgment.

The First Circuit has thus concluded that a Title VII claimant who adduces sufficient evidence to permit a finding that the employer's asserted non-discriminatory reason is a pretext is still subject to summary disposition unless she produces additional affirmative evidence of discriminatory intent or the district judge (not the ultimate factfinder) determines that an inference of discrimination is warranted by the evidence of pretext.

A. The District Court Proceedings and Statement of Facts.

This petition involves the application of Fed.R.Civ.P. 56 as applied in connection with the burden-shifting framework set forth by the Court in McDonnell-

---

[1] 113 S.Ct. 2742 (1993).

Douglas v. Green,[2] Texas Department of Community Affairs v. Burdine,[3] and most recently addressed in Hicks.

Stratus is a corporation which manufactures "fault-tolerant" computers. It employed Petitioner in May, 1989 as its director of product marketing. App. A, infra, 3a. Petitioner was highly qualified for the position, having served as marketing director for another computer company for five years and previously earned both master's and doctoral degrees in psychology. App. A., infra, 3a-4a.

The record of Petitioner's employment at Stratus is replete with documentation of Stratus' complete satisfaction with her performance. The only formal personnel review of Petitioner conducted during the term of her employment[4] rated her as "excellent" and a "substantial and valuable contributor." App.A, infra, 4a. That review, after approximately six months of employment, resulted in a 5% increase in Petitioner's salary and the issuance of stock options for an additional 1,500 shares. App. A, infra, 4a. Her supervisor also

---

[2] 93 S.Ct. 1817 (1973).

[3] 101 S.Ct. 1089 (1981).

[4] Stratus' own policies provided for periodic personnel reviews and Petitioner received such a review in December, 1989, some six months after she started employment. Stratus produced no written personnel review of Petitioner at any time during 1990 or, indeed, at any time during 1991 to and including her termination at the beginning of July, 1991. Record Appendix before the Circuit Court, pp. 960-1058, 1064-1125, 1317-1324.

recommended that Petitioner be promoted to vice-president for product marketing.

Petitioner's next supervisor, to whom she reported during 1990 again recommended, after Petitioner had been reporting to him for four months, that she be promoted to vice president and acknowledged in his deposition testimony that he would not have recommended the promotion had he not been satisfied that Petitioner was performing well enough to merit the promotion. App. A, infra, 5a. Furthermore, in June, 1990 Petitioner was given a 4.8% salary increase in recognition of her promotion and an additional 5% merit raise. While Stratus produced no formal personnel review of Petitioner by her second supervisor, it was fairly inferable from the objective record of the promotion and salary increases which Petitioner received while reporting to him, that he, too, considered her performance to be highly satisfactory.

Effective January 1, 1991, as part of a further internal reorganization at Stratus, Smith's supervisor was again changed, this time to Gary Haroian. Haroian was a member of senior management who had previously expressed reservations about Petitioner's promotion to vice president (App.A, infra, 5a), who had never had a female member of senior management reporting to him and who "wasn't a fan" of Petitioner. App. A, infra, 6a and Record Appendix, below, 1227-1228.

Stratus also failed to produce any written personnel evaluation of Petitioner by Haroian but, during the period that Petitioner reported to him, her satisfactory performance was recognized by (1) the expansion of her duties to include both corporate communications and

marketing (Record Appendix, below, 1233-34), (2) her further promotion, in May, 1991 (little more than a month before her termination) to Vice President of Corporate Marketing (Record Appendix, below, 1234-1237), (3) an increase in both her staff and budget which reflected her increased responsibilities (Record Appendix, below, 1217, 1238) and (4) the award, by a letter dated March 27, 1991 and signed by her supervisor, Haroian, of further stock options, granted, in Haroian's words, "to recognize your performance." (Record Appendix, below, 1127-28, 1062). Thus, there was objective evidence that even Haroian, who recommended Petitioner's termination in June and who had claimed to have been growing dissatisfied with her for a significant period prior thereto (App. A, infra, 6a) had, in fact, been quite satisfied with Petitioner's performance. [5]

---

[5] The Court of Appeals relied upon testimony of Haroian in which he claimed growing dissatisfaction with Petitioner (App.A, infra, 6a-7a), despite its recognition that on summary judgment "we view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in plaintiff's favor." App.A, infra, 2a. The acceptance of Haroian's claims of dissatisfaction in the face of objective evidence supporting a contradictory inference was impermissible on summary judgment. The erroneous acceptance, as "undisputed," of Haroian's claims underlies the Court of Appeals' conclusion that the "abundance of evidence" of Stratus' satisfaction with Petitioner, while arguably "sufficient to support a finding of pretext...could not, standing alone, possibly lead a reasonable jury to conclude that discriminatory animus was the real motivation...." App.A., infra, 13a-14a. The same evidence which both the Court of Appeals and the District Court had assumed was sufficient to permit a finding that Stratus' claimed dissatisfaction was a pretext also permitted a rational inference that it was advanced to conceal discrimination. This is so because a finding of pretext would necessarily entail a finding that Haroian was untruthful about his claimed dissatisfaction, Stratus had advanced no other explanation and none was suggested by the record, as to why else he

(continued...)

Petitioner had no indication from any source that there was any problem until a meeting on June 12, 1991, shortly before she was scheduled to begin her vacation. App. A, infra 6a and Record Appendix, below, 583, 912-15. Informed, for the first time, about Haroian's professed dissatisfaction, Petitioner immediately offered to cancel her vacation plans in order to address immediately any perceived problem. Record Appendix, below, 584, 915-16. However, Haroian assured her that she did not need to change her vacation plans and that it was not necessary for her to consider resignation. App. A, infra, 6a and Record Appendix, below, Id.

Stratus' "Performance Improvement Policy" encouraged supervisors to specifically document instances of an employee's deteriorating performance by keeping "an accurate and up-to-date file of the employee's work performance." Record Appendix, below, 1080. Notwithstanding, Stratus produced no documentation by Haroian or anyone else which contemporaneously documented any deterioration in Petitioner's performance.

Upon Petitioner's return on July 1, 1991, Haroian terminated her. App. A, infra, 7a. Contrary to the requirements of Stratus' personnel policies, no personnel

---

[5](...continued)
might have been untruthful about the matter. Thus, the possibility that, in unusual circumstances, an employer might advance a false claim as to its "non-discriminatory" reason not to conceal discrimination, but to hide another more embarrassing, but also non-discriminatory, reason, referred to by the Court, below (App.A, infra, 12a-13a) and mooted in Woods v. Friction Materials, Inc., 30 F.3d 255, 260-61 (at fn.3) is irrelevant to the facts of this case. See infra, pp. 22-23 and n.28.

action document specifying the action taken or the circumstances was prepared. Record Appendix, below, 1169-70, 1542-44. Stratus' "Performance Improvement Policy" also provided that, where a performance problem was perceived, the supervisor was to (1) meet with the employee, provide information as to the problem, indicate that a failure to resolve it would likely lead to further action, (2) deliver a subsequent verbal warning if the problem was not resolved and (3) if the problem had still not been resolved, issue a written warning specifying what corrective action is required and the time period within which it is to be accomplished. The Policy further provided that each of these steps were to be documented by the supervisor and that all were normally to be employed prior to termination. Record Appendix, below, 1080-83.

Again, Stratus produced no documentation indicating that any of these procedures had been followed with respect to Petitioner. In sum, Stratus produced no documentation that any effort had been made to counsel with Petitioner regarding any perceived deficiencies in her performance or to correct same prior to her termination, despite the existence of internal policies at the time which plainly contemplated such efforts. Record Appendix, below, Id.

Thus, Petitioner adduced evidence of her satisfactory performance throughout the period of her employment, including repeated promotions, merit pay increases and the awarding of additional stock options expressly in recognition of her performance, the most recent of which were within approximately three months of her termination. Despite the fact that its existing

policies plainly contemplated both the creation of contemporaneous documentation of perceived performance deficiencies and the employment of a progressive warning and counselling process in an effort to resolve them, Stratus produced no contemporaneous documentation of any deficiencies in Petitioner's performance and the only such evidence came from testimony, after both termination and the institution of this suit, by Haroian and other employees of Stratus as to Petitioner's alleged deficiencies.

On this record, the District Court granted Stratus' Motion for Summary Judgment, assuming that Petitioner had produced sufficient evidence that Stratus' claim of her unsatisfactory performance was a pretext (App. B, infra, 23a) but concluding that Petitioner had not adduced sufficient additional evidence, beyond that of pretext, that Stratus' real reason was discriminatory. App. B, infra, 23a-26a.

B. The Court of Appeals Proceedings

On appeal, the First Circuit affirmed and approved the District Court's interpretation and application of Hicks to the requirement of proof on summary judgment. In addressing the impact of Hicks, the Court of Appeals referred to its recent decision in Woods v. Friction Materials,[6] in which the court had considered the issue. The court wrote,

> as stated in Woods, we interpret [the above passage from] Hicks as making clear

---

[6] 30 F.3d 255 (1st Cir. 1994).

> that the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide a strong enough inference of actual discrimination to permit the factfinder to find for the plaintiff. Conversely, we do not think that the Supreme Court meant to say that such a finding would always be permissible ... . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends upon the individual facts.

The Court referred to its suggestion, in Woods, of the possibility that evidence before the court at the summary judgment stage might show that the employer's reason was false but also might show conclusively that the actual reason, even if otherwise wrongful, was not discriminatory, thus refuting the Title VII claim. App. A., infra, 13a, citing Woods, 30F.2d 255, at 26 fn. 3.

The Court then went on to state that "the district court interpreted Hicks correctly when it ruled that, to survive Stratus' summary judgment motion, Smith had to adduce sufficient evidence to support a finding that Stratus' stated reason was not only a pretext, but that it was a pretext for illegal sex discrimination."[7]

In applying this standard, the court held that "even if we assume arguendo that [Smith's] evidence is sufficient

---

[7] Smith, 40 F.3d at 16; App. A, infra, 13a.

to support a finding of pretext, it could not, standing alone, possibly lead a reasonable jury to conclude that discriminatory animus was the real motivation ...'[8] (emphasis added).

In so holding, the Court of Appeals (1) rejected Petitioner's argument that the district court misconstrued the language of Hicks and other Supreme Court precedent, (2) ignored the substantial evidence adduced by Petitioner indicating both Stratus' actual satisfaction with her performance and the likelihood that Harioan's professed dissatisfaction was deliberately and falsely advanced, and (3) approved the District Court's refusal to recognize that an inference of discrimination from the evidence of pretext was permissible in light of the complete absence of any other evidence even suggesting, much less establishing, any other non-discriminatory reason which might have raised the issue mooted in Woods.

REASONS FOR GRANTING THE PETITION

This case presents a timely opportunity to eliminate an irreconcilable conflict which has developed among the various circuits and to correct an erroneous misinterpretation of the law by the minority circuits regarding the application of the requirement of proof expounded in Hicks to motions for summary judgment. The issue has been broadly developed in circuit court decisions from at least eleven of the circuit courts of appeals and is of decisive importance to the effectiveness

---

[8] Id., App. A, infra, 14a.

of enforcement of Title VII through private civil claims of employment discrimination.

I.

THE COURT OF APPEALS' INTERPRETATION OF HICKS CONFLICTS WITH THE INTERPRETATION BY OTHER CIRCUITS AND EXACERBATES AN EXISTING CONFLICT OF AUTHORITY.

It is generally agreed that the precise holding of Hicks; that proof of a prima facie case and pretext does not mandate judgment for the plaintiff as a matter of law, addressed the burden of proof that a plaintiff must bear at trial. However, since the Hicks decision, the circuit courts have continued to struggle with the application of that holding to the burden a plaintiff bears in resisting a defendant employer's motion for summary judgment.

In the wake of Hicks, two distinct standards have emerged, both of which are assertedly premised upon different portions [9] of the court's opinion. This confusion appears to be centered upon those passages in the Opinion of the Court which indicated: (1) that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination" and that "upon such rejection, '[n]o

---

[9] See Jody H. Odell, Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and its Application to Summary Judgment, 69 Notre Dame L. Rev. 1251 (1994).

additional proof of discrimination is required,'"[10] and (2) that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason"[11] and "it is not enough ... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination."[12] Despite Justice Scalia's explanation that the above-cited provisions are not inconsistent,[13] the lower federal courts have interpreted the decision in conflicting ways when evaluating the requirement of proof to defeat a motion for summary judgment.

A) Majority Position

Currently, a majority of the circuit courts including the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits,[14] adhere to the position

---

[10] St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2749 (1993), citing the decision of the appeals court below, 970 F.2d 487, 493 (8th Cir. 1992).

[11] Id at 2752.

[12] Id. at 2754.

[13] Id. at 2749, fn. 4.

[14] See e.g., Chambers v. TRM Copy Centers Corporation, 1994 WL 707278 (2nd Cir. 1994) (burden of proof that must be met to permit an employment-discrimination plaintiff to survive a summary judgment motion at prima facie stage is de minimis and pretext may be shown either by the presentation of additional evidence showing that the

(continued...)

14(...continued)
employer's proffered explanation is unworthy of credence or by reliance on the evidence comprising the prima facie case, without more); Fuentes v. Perskie, 32 F.3d 759 (3rd Cir. 1994) (in order to survive summary judgment motion, plaintiff must adduce evidence which casts doubt on each of the employer's proffered non-discriminatory reasons or sufficient evidence to allow a factfinder to infer that discrimination was more likely than not a motivating cause of the employment action); Mitchell v. Data General Corporation, 12 F.3d 1310 (4th Cir. 1993) (indicating that a plaintiff may be defeated by a summary judgment motion in two ways: by failing to establish a prima facie case or by failing to show a genuine factual dispute over the employer's legitimate non-discriminatory explanation); Kline v. Tennessee Valley Authority, 1 F.3d 1241 (6th Cir. 1993) (Hicks indicates that proof of a prima facie case and a showing of pretext may suffice to establish intentional discrimination and thus survive summary judgment); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) (stating that both McDonnell-Douglas and Hicks speak to the burden the plaintiff bears at trial, whereas, for summary judgment purposes, the plaintiff bears the lesser burden of merely producing evidence from which a rational factfinder could infer that the employer lied about its proffered reasons); Gaworski v. ITT Commercial Finance Corp., 17 F.3d 1104 (8th Cir.) cert. den. 115 S.Ct. 355 (1994) (citing Hicks for the proposition that if the elements of a prima facie case are present and there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its action, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred); Washington v. Garrett, III., 10 F.2d 1421 (9th Cir. 1993) (noting that because, as Hicks recognized, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be a question for the factfinder once a plaintiff raises an issue as to pretext); Durham v. Xerox Corporation, 18 F.3d 836 (10th Cir.) cert. den. 115 S.Ct. 80 (1994) (although a prima facie case combined with disproof of the employer's explanation does not prove intentional discrimination as a matter of law, it may permit the factfinder to infer intentional discrimination, and thus preclude

(continued...)

that a plaintiff's burden at summary judgment is to establish a prima facie case of discrimination and, if the employer articulates a legitimate, non-discriminatory reason for the employment action, to raise a genuine issue as to whether the articulated reason was a pretext. These courts have determined that once a plaintiff succeeds in raising a genuine factual issue as to the employer's stated motive, summary judgment is no longer appropriate because it is for the trier of fact to determine whether the claimed non-discriminatory reason is a pretext and, if so, whether discriminatory motive is to be inferred therefrom. In other words, once evidence of pretext [15] has been

---

14(...continued)
summary judgment for the employer); Hairston v. Gainesville Sun Publishing Co., 9 F.3d 913 (11th Cir. 1993) (the burden to avoid summary judgment is not to show by a preponderance of the evidence that the reasons stated were pretext, but is met by introducing evidence that could form the basis for a finding of facts, which when taken in the light most favorable to the nonmoving party, could allow a jury to find by a preponderance of the evidence that the plaintiff has established pretext).

[15] When considering the issue of pretext, the majority courts acknowledge that a showing of pretext is made upon the introduction of evidence indicating not that the employer's articulated reason is merely erroneous or mistaken, but that it is "phony" or a "cover-up." If a plaintiff fails to introduce evidence upon which a jury could make such a finding of pretext, summary judgment will be entered in favor of the employer. See generally, Sempier v. Johnson & Higgins, 1995 WL 3408 (3rd Cir. 1995) (indicating that pretext is not demonstrated by showing simply that the employer was mistaken, but instead the record is examined for evidence of inconsistencies or anomalies that could support an inference that the employer did not act for its stated reasons); Manzer v. Diamond Shamrock Chemicals Company, 29 F.3d 1078 (6th Cir. 1994) (the plaintiff makes a submissible case on the issue

(continued...)

introduced by the plaintiff, it is a fact issue as to whether the employer's deliberate reliance upon a false justification, together with the prima facie showing, will lead the factfinder to an inference of discrimination.

Under the majority interpretation, proof of a prima facie case and a clear showing of pretext, without anything more, will always create a genuine issue of fact precluding summary judgment in favor of the employer.[16]

The Ninth Circuit's opinion in Washington v. Garrett, III[17] is illustrative of the majority standard. The plaintiff in Washington was a black woman who worked as a Public Affairs Specialist at the Naval Training Center in San Diego, California. She asserted that her dismissal from this position was the result of discrimination on the

---

15(...continued)
of pretext if the evidence is such that a jury could find: (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the discharge); Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) (citing the majority standard but upholding summary judgment in favor of the employer on the basis that the plaintiff had not made a sufficient showing of pretext); Durham v. Xerox Corporation, 18 F.3d 836 (10th Cir. 1994) (same); Mitchell v. Data General Corporation, 12 F.3d 1310 (4th Cir. 1993) (same).

16 No case has been found from any of the circuits in the majority which has expressly dealt with the situation mooted by the First Circuit in Woods, supra, at 261 n.3. It seems clear, however, that the majority circuits, if they recognized such a situation as permitting summary judgment at all, would require that evidence of a specific non-discriminatory reason other than the pretextual one advanced by the employer, be conclusively established on the record.

17 *supra* note 6.

basis of race and sex. The district court granted the defendant's motion for summary judgment, concluding that Washington failed to produce sufficient evidence that the defendant's non-discriminatory reason for her discharge was a pretext for discrimination.

On appeal, the Ninth Circuit reversed the district courts' entry of judgment. The court stated:

> The burden on summary judgment of a plaintiff asserting disparate treatment under Title VII is thus to establish a prima facie case of discrimination and, if the employer articulates a legitimate, non-discriminatory reason for its actions, to raise a genuine factual issue as to whether the articulated reason was pretexual. (citations omitted). If a plaintiff succeeds in raising a genuine factual issue regarding he authenticity of the employer's stated motive, summary judgment is inappropriate, because it is for the trier of fact to decide which story is to be believed. [18]

The Washington court based its reasoning upon the Hicks majority opinion. Specifically, the court noted that

> [b]ecause, as St. Mary's recognizes, the factfinder in a Title VII case is entitled to infer discrimination from plaintiff's proof of a prima facie case and showing of pretext without anything more, there will always be

---

[18] Id. at 1433.

> a question for the factfinder once a plaintiff establishes a prima facie case and raises a genuine issue as to whether the employer's explanation for its action is true. Such a question cannot be resolved on summary judgment. [19]

B) Minority Position

A minority of circuit courts, including the First and Fifth Circuits,[20] have chosen a significantly more demanding requirement of proof in deciding summary judgment motions. Courts which implement the minority standard require the plaintiff to adduce evidence both that that employer's reason is a pretext and, additionally, that the actual reason is discrimination. Under this approach, the court does not ignore evidence of pretext, but it rejects

---

[19] Id.

[20] See e.g., Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) (evidence of pretext does not necessarily permit an inference of discrimination and the trial court may grant summary judgment despite such evidence, if it (not the factfinder) finds the inference unpersuasive); Bodenheimer v. PPG Industries, Inc., 5 F.3d 955 (5th Cir. 1993) (since Hicks requires that a plaintiff prove intentional discrimination, and since a plaintiff would be required to prove at trial that the employer's proffered reasons are a pretext for discrimination, at the summary judgment phase the plaintiff must produce sufficient evidence that the employer's reasons were pretexts for discrimination). See also Dhuria v. Trustees of the University of the District of Columbia, 827 F.Supp. 8181 (D.D.C. 1993) (applying the minority standard and entering summary judgment in favor of the employer).

the idea that a showing of pretext, without more, raises a genuine issue of material fact as to discrimination. [21]

Generally, the minority courts rely upon the language in Hicks which states that "proving the employer's reason false becomes part of (and often considerably assists) the greater enterprise of providing that the real reason was intentional discrimination" [22] and that "[I]t is not enough ... to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." [23] These courts reason that once the employer produces evidence of a legitimate, non-discriminatory motive in response to the plaintiff's complaint, only the "ultimate" issue remains; whether the

---

[21] In considering the question of pretext, the minority courts indicate that a showing that the employer's stated non-discriminatory reason is false or "phony" is not sufficient. In order for a plaintiff to survive such a motion, he or she must adduce evidence from which the district court determines that a jury could properly infer intentional discrimination. See generally Woods v. Friction Materials, Inc., 30 F.3d 255 (1st Cir. 1994) (plaintiff cannot avert summary judgment if the record is devoid of "adequate" direct or circumstantial evidence of discriminatory animus on behalf of the employer); Equal Employment Opportunity Commission v. Bailey Ford, Inc. 26 F.3d 570 (5th Cir. 1994) (interpreting Hicks as requiring that, after proving that the employer's articulated reason is pretexual, the plaintiff must also prove that the employer intended to discriminate in order to survive summary judgment); Dhuria v. Trustees of the University of the District of Columbia, 827 F.Supp. 818 (D.D.C. 1993) (plaintiff must also prove that he has been the victim of intentional discrimination in order to avoid summary judgment).

[22] Hicks at 2752.

[23] Id. at 2754.

employer was motivated by discriminatory animus. However, they fail to give effect to this Court's statement in Hicks that upon a finding of pretext, the factfinder may infer discrimination and that once pretext is proven, no further evidence of discrimination is required.

This conflict among the circuits is presently unresolved. The desirability of resolving it is underscored by this Court's statement that it granted review in Hicks precisely to resolve an existing conflict among the circuits in applying the burden-shifting formula. See, Hicks, 125 L.Ed 2d at 419. That conflict has persisted even after Hicks and the importance of resolving it is undiminished.

Thus, unless the trial court determines that the available evidence creates a factual dispute on the "ultimate" issue of discrimination, viewed separately from the issue of pretext, summary judgment is appropriate. As a result, some plaintiffs such as Petitioner here, who succeed in proving a prima facie case and in introducing evidence of pretext are precluded from reaching a jury if the district court determines that a jury could not "properly" infer discrimination from the particular facts of the case. App. A, infra, 13a-14a. See also Bodenheimer v. PPG Industries, Inc.[24]

---

[24] *supra* note 11.

II.

THE FIRST CIRCUIT'S DECISION IS ERRONEOUS AND THE MAJORITY POSITION IS MORE CONSISTENT WITH THE PURPOSES BEHIND FEDERAL RULE OF CIVIL PROCEDURE 56 AND THE MCDONNELL-DOUGLAS/ BURDINE/ HICKS FRAMEWORK.

As the Court's opinion in Hicks points out, there is no internal inconsistency in the reasoning of Hicks. It is not inconsistent to say that evidence of pretext may be sufficient and, at the same time, that proof of discrimination is required, where discrimination may be inferred from a finding of pretext. Hicks, supra, at n. 4.

Indeed, the Court, even though it reversed the Eighth Circuit in Hicks, expressly approved the Circuit Court's determination that, upon rejection of the employer's reason as a pretext, "no additional proof of discrimination is 'required.'" Hicks, 125 L.Ed. 2d at 418-19.

Moreover, the Court's disposition in Hicks renders its holding unmistakable. The District Court had found that the employee's claimed non-discriminatory reason was a pretext but that the real reason was nonetheless non-discriminatory. The Eighth Circuit had reversed the District Court's judgment for the defendant employer. This Court, in reversing the Eighth Circuit, did not reinstate the District Court's judgment but, instead, remanded the case to the Eighth Circuit to consider whether the District Court's refusal to infer discrimination was "clearly erroneous." That question could not have been open on appeal if an inference of

discrimination by the District Court, on the basis of its finding of pretext, had not been permissible.

It is undisputed that Hicks establishes that proof of a prima facie case and pretext may raise a sufficient inference of discriminatory intent to support a jury verdict in favor of a plaintiff at trial. Of course, a finding of pretext does not mandate such an inference. In order for a plaintiff to succeed at trial, the factfinder must find not only that the employer's articulated, non-discriminatory reason was a pretext, but also that discrimination was the true reason.[25] A plaintiff may not prevail as a matter of law merely by establishing that the employer's articulated reason is pretexual. The plaintiff who elects to rest upon proof of pretext alone, runs the risk that the factfinder may decline to infer discrimination therefrom.[26] Thus Hicks teaches that at trial additional evidence of discriminatory intent is prudently offered to persuade the factfinder to make this determination. However such additional evidence is not required as a matter of law.[27]

The Hicks opinion clearly sets forth the burden of persuasion that a plaintiff must bear to prevail at trial. The issue presented by this case is what is required at

---

[25] Hicks, 113 S.Ct. at 2749, fn. 4.

[26] "That the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that the plaintiff's proffered reason [of discrimination] is correct. That remains a question for the factfinder to answer, subject, of course, to appellate review ..." Id. at 2755.

[27] Id. at 2749.

summary judgment to establish plaintiff's right to a trial. At summary judgment, the trial court's function is not to make a determination as to which side of the story it believes to be more credible, but merely to determine whether or not sufficient evidence has been produced so that the nonmoving party could prevail at trial.

The majority courts properly note that, since Hicks recognizes that a jury may infer discrimination from evidence of a prima facie case and pretext alone, a jury question will arise upon the introduction of evidence which, if believed, would permit a finding that the employer's articulated reason has been advanced as a pretext.

This is not to say that, upon a finding of pretext, a finding of discrimination will inevitably follow. Evidence such as that mooted by the First Circuit in Woods, supra, at 261 n.3, that the employer's reason, although false, was advanced to conceal a true reason which was also non-discriminatory, might well dissuade the factfinder from inferring discrimination. But the deliberate advancement of a pretextual reason in the context of a claim of discrimination is surely suggestive and, in the absence of some persuasive explanation, is sufficient to permit the factfinder to infer that it has been advanced to conceal discrimination, as Hicks expressly recognized.

Thus, the introduction of evidence sufficient to permit a finding that the employer's stated reason is a pretext creates a genuine issue of material fact as to whether the pretext has been advanced to conceal discrimination. In this respect, the majority circuits are

plainly more consistent with both the express language and the reasoning of Hicks.[28]

The employer's burden under the McDonnell-Douglas/Burdine/Hicks framework is not onerous. All that is required to defeat a plaintiff at the summary judgment stage is the articulation of one "true" non-discriminatory reason for the employment decision. This consists of any legitimate reason that is not precluded by

---

[28] For example, in support of its implementation of the minority standard in Woods, *supra*, the First Circuit proposed the following hypothetical:

> [S]uppose an employee made out a truly bare-bones prima facie case of age discrimination, and the employer responded that the employee lacked the necessary skills for the job. Suppose also that unrefuted evidence showed that the response was a pretext, because the employer had fired the employee to conceal the employer's own acts of embezzlement. In such an instance, there would be a prima facie case at the outset and a disbelieved pretext, but we think it plain that no reasonable jury could find age discrimination on such a record. Woods *supra* at 260.

While it may seem clear, in hindsight and with all the relevant information exposed, that a reasonable finding of discrimination could not be made on such a record, it seems equally clear that, given evidence of pretext, an inference of discrimination is reasonable and should be permissible unless and until some other non-discriminatory reason is clearly established, whether on the record on summary judgment or at trial. The question of whether such evidence would permit a summary judgment despite sufficient evidence of pretext is not presented by this case as there was no evidence before the District Court which even suggested, much less conclusively established, any other non-discriminatory motive.

the particular federal statute invoked by the plaintiff. To survive summary judgment, the plaintiff must introduce evidence sufficient to permit a finding that the articulated reason has been falsely put forward as a pretext. In the instant case, Petitioner adduced evidence of (1) Stratus' treatment of her, including repeated promotions, merit raises and stock option awards, which showed that Stratus itself recognized her superior performance, (2) the lack of any contemporaneous documentation of performance deficiencies and (3) Stratus' failure to follow to follow its own internal policies in documenting such alleged inadequacies or dealing with them. See, supra, pp. 7-8. Petitioner thus introduced ample evidence to show not merely that Stratus' claim of unsatisfactory performance was "untrue," but that Stratus knew it was untrue and advanced it as a pretext.

In those cases where the articulated reason is the "true" reason, the plaintiff will almost certainly fail to introduce sufficient evidence of pretext, and a summary judgment for the employer will follow. Where the employer chooses to assert a reason which can be found to be a pretext, the plaintiff should be permitted to proceed to trial so that the issue of pretext may be determined and so that the factfinder can decide whether to infer discrimination. Whether the "true" reason was discriminatory or merely embarrassing (but non-discriminatory), is a genuine issue of material fact that rests largely upon credibility determinations, thus again requiring a factfinder's determination.

It follows that the Court of Appeals' decision is not only in conflict with the rule of a majority of the circuits,

it construes Hicks erroneously, both as a matter of law and as a matter of sound policy.

III.

IMPORTANCE OF THE QUESTION PRESENTED.

By enacting the anti-employment-discrimination statutes and through the formulation of the McDonnell-Douglas / Burdine / Hicks framework, both Congress and this Court have recognized the need to provide an effective means of redressing the important and continuing problem of discrimination in the work place. The recent 1991 amendments to Title VII further indicate Congressional recognition that attainable judicial remedies are needed to provide an effective and uniform means of enforcement. In taking these steps, it has been recognized that discrimination rarely if ever occurs in a direct fashion. As a result, this Court has erected an evidentiary framework that allows a plaintiff to obtain relief when the employer's discrimination is covert. The requirement of proof recognized by a majority of the circuit courts when assessing a grant or denial of summary judgment furthers the goal of the McDonnell-Douglas / Burdine / Hicks framework because it allows plaintiff a fair opportunity to convince a factfinder that discrimination should be inferred from the deliberate advancement of a pretextual reason by the employer.

The minority standard, however, hinders the goals that federal employment discrimination law was enacted to achieve. Today, many plaintiffs are precluded from fully adjudicating their claims as a direct result of the

interpretation and implementation of the Hicks decision in the minority circuits. As a result, meritorious claims are being cut short, allowing a societal evil to perpetuate.

Most importantly, however, discrimination claimants are being treated disparately in the lower courts. It is clear that had Petitioner's claim arisen in one of the majority circuits, her evidence that Stratus' claimed reason is a pretext would have been sufficient to defeat summary judgment and to entitle her to a trial. Regardless of whether this Court agrees with the majority or minority standard, all litigants relying upon the federal prohibition of employment discrimination should be subject to the same standard of proof.

For example, the evidence of pretext addressed by Petitioner here was plainly stronger than that in Sempier v. Johnson & Higgins,[29] where the Third Circuit reversed a grant of summary judgment which, had it come before the First Circuit, would equally clearly have been affirmed.

Like Sempier, Petitioner was a former executive employee who was allegedly terminated from her position as a result of unlawful discrimination. To rebut Petitioner's gender discrimination claim, Respondent, like Johnson & Higgins, asserted that it was not her sex but her unsatisfactory performance which actually drove the decision to fire her. To support this assertion, Respondent also introduced post litigation testimony of Petitioner's superiors and co-workers.

---

[29] 1995 WL 3408 (3rd Cir. N.J.)

Similarly to Sempier, Petitioner introduced "an abundance of evidence"[30] indicating that her performance was satisfactory and that her performance had never been criticized until a short time before her termination. Moreover, she introduced evidence which strongly indicated that her satisfactory performance had been recognized as such by Stratus and, indeed, by the very person who terminated her.[31]

Despite such evidence the Court of appeals relied upon Haroian's testimony (unsubstantiated by any of the contemporaneous documentation called for by Stratus' internal personnel policies) that he was dissatisfied with Petitioner and concluded that no reasonable factfinder could have inferred that Stratus' pretext of dissatisfaction was advanced to conceal discrimination. The summary disposition of Petitioner's discrimination claim is a paradigm of the minority circuits' disregard of the permissive inference of discrimination from proof of pretext, which was expressly approved in Hicks, to create an insurmountable barrier to the maintenance of Title VII claims by the victims of discrimination.

A comparison of the results in Sempier and Smith clearly exhibits how similar cases are reaching irreconcilably different results in the circuit courts. With each new case, the majority and minority standards are becoming even more firmly rooted within the lower federal courts. Resolution of the issue by this Court is

---

[30] App. A, infra, 13a.

[31] See, supra, p. 5.

needed to restore a unified approach and standard of proof in all of the lower federal courts.

CONCLUSION

In Hicks, this Court, by a bare majority, concluded that proof that an employer's asserted non-discriminatory reason is a pretext does not require an inference of discrimination. The minority circuits, including the First Circuit in the instant case, have now held that proof of pretext is not enough, even on a record devoid of evidence of any other non-discriminatory reason, even to permit an inference of discrimination and thus entitle plaintiff to a trial of her claims. That holding distorts the holding and reasoning of Hicks, extends the barriers to proof of Title VII claims far beyond those established by the Court's opinion, effectively cripples the maintenance of Civil Title VII claims and results in disparate treatment of such claims as between the majority and minority circuits.

For each of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Laurence M. Johnson
Counsel of Record
Ann E. Johnston
Fordham & Starrett, P.C.
260 Franklin Street
Boston, MA 02110
(617) 439-0300
Counsel for Petitioner

APPENDIX A - OPINION BELOW

UNITED STATED COURT OF APPEALS
For the First Circuit

No. 94-1306

STEPHANIE S. SMITH,
Plaintiff, Appellant,

v.

STRATUS COMPUTER, INC.,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

[Hon. William G. Young, U.S. District Judge]

Before

Selya, Circuit Judge,
Campbell, Senior Circuit Judge,
and Stahl, Circuit Judge.

Appendix A

Laurence M. Johnson, with whom Ann E. Johnston and Fordham & Starrett, P.C., were on brief for appellant.

Samuel A. Marcosson, Attorney, James R. Neely, Jr., Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, and Vincent J. Blackwood, Assistant General Counsel, were on brief for the Equal Employment Opportunity Commission, amicus curiae.

David H. Erichsen, with whom Peter A. Spaeth, Ann K. Bernhardt, and Hale and Dorr, were on brief for appellee.

November 22, 1994

STAHL, Circuit Judge. Plaintiff Stephanie S. Smith sued her former employer, Stratus Computer, Inc. ("Stratus"), for illegal sex discrimination. The district court granted summary judgment for Stratus and Smith appeals. We affirm.

I.
Standard of Review and Background

A. Standard of Review

Because we are reviewing a grant of summary judgment, we view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in plaintiff's favor. Woods v. Friction Materials, Inc., 30 F.3d 255, 259 (1st Cir. 1994). Summary Judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When a party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party bears the burden of proof at trial, there can no longer be a genuine issue as to any material fact: the failure of proof as to an essential element necessarily renders all other facts immaterial, and the moving party is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). See also Woods, 30 F.3d at 259. Even in an employment discrimination case, "'where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'" Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1116 (1st Cir. 1993) (quoting Medina-Munoz v. R.J. Reynolds Tobacco Co., 896 F.2d 5, 8 (1st Cir. 1990)).

B. Factual and Procedural Background

Smith was hired in May 1989 as director of product marketing by Stratus, a Marlboro, Massachusetts, corporation that designs, manufactures and sells "fault-tolerant" computer systems and products -- i.e., products that enable customers to remain on-line in the event of a system failure. Previously, Smith had worked for more than five years as a marketing director for another Boston-area computer company and had earned master's and doctoral degrees in psychology from the University of

Illinois. Smith received from Stratus a $115,000 starting salary, a $15,000 sign-on bonus, and options on 7,000 shares of Stratus stock.

Smith's first months at Stratus proceeded smoothly. In December 1989, William Thompson, Smith's supervisor and Stratus's senior vice-president of marketing, gave her a favorable performance review. Thompson described Smith's start at Stratus as "excellent," and wrote that she was "perceived as a substantial and valuable contributor to Stratus." Thompson rated Smith's overall performance as "exceed[ing] expectations in several significant areas," the second-highest of five possible performance ratings. Contemporaneous with her review, Smith received a 5% raise and stock options for an additional 1,500 shares.

Around January 1990, as part of a company reorganization, Smith came under the direct supervision of Stratus co-founder Robert Freiburghouse, who held the title of senior vice-president for marketing and engineering. Before the reorganization, Thompson had recommended that Smith be promoted to vice-president for product marketing -- a title that Smith thought was critical to her effective interaction with executives in other departments. Freiburghouse did not act immediately on Thompson's recommendation; he testified in his deposition that he was uncertain about her qualifications for the title. In April 1990, however, after personally supervising Smith for four months, Freiburghouse recommended that Smith be named a vice-president.

Appendix A

In June 1990, Smith received a 4.8% raise in recognition of her new title as well as another 5% merit raise, bringing her annual salary to $133,000. Although the record contains no formal evaluation of Smith's work by Freiburghouse, Smith stated that Freiburghouse told her that she was one of his top two employees, and that John Young, Stratus's vice-president for human resources, told her that Freiburghouse was very enthusiastic about her performance. In deposition testimony, Freiburghouse described Smith's performance only as "satisfactory." Freiburghouse did say, however, that if she had not been performing well enough to merit the title of vice-president, he would not have recommended her promotion.

In the fall of 1990, Smith learned that the company would again be reorganized at the end of that year, this time bringing her under the supervision of Gary Haroian, Stratus's general manager of corporate operations.

The prospect of working for Haroian worried Smith. Haroian had a different view of marketing's proper function within the company; he thought marketing should focus more on supporting the sales staff and conducting rigorous pricing analyses and less on product development, which he saw as the purview of the engineering department. Months earlier, Haroian had expressed some reservations to Freiburghouse about Smith's promotion to vice-president, although the evidence does not indicate whether Smith ever learned about this. Smith did know, however, about Haroian's differing vision of the marketing function; she testified in her deposition

that she knew he "wasn't a fan." In a meeting with Freiburghouse before the change took effect, Smith expressed her concern about working for Haroian, even asking Freiburghouse if she should quit. In her deposition, Smith testified that she was not serious about quitting, but merely soliciting reassurance from Freiburghouse that she was generally on the right track and would be able to work things out with Haroian.

Things did not work out, though -- at least from Haroian's perspective. Although Smith testified that she received no indication that anything was seriously amiss until a June 12, 1991, meeting with Haroian, Haroian testified that the meeting was the culmination of several weeks of mounting frustration over Smith's failure to redirect the marketing effort in the way he desired. In addition, Haroian testified that he had been hearing numerous complaints about Smith's leadership and poor morale within the marketing group. At the June 12 meeting, Haroian outlined the problems he perceived, and Smith asked him whether she should just take a severance package (Smith testified that, as was her habit, she was reacting emotionally, and was not serious about quitting). Haroian, however, told Smith not to worry, that things were not all that bad, and that he would think about how to proceed during Smith's vacation, which was to begin the next day. Smith went home that night and drafted a handwritten memo to Haroian outlining how she proposed to solve the problems he perceived in marketing.

While Smith was on vacation, Haroian heard further complaints about Smith's lack of leadership and

focus from mid-level managers who reported directly to Smith. At the end of June, Haroian spoke with Stratus's president, William Foster, and Stratus's human resources vice-president, John Young, about removing Smith from her position as marketing vice-president. Both of them agreed that Haroian should take such action. On July 1, 1991, the day Smith returned from vacation, Haroian met with Smith in his office and informed her that he was removing her from her job as marketing vice-president.

Exactly what happened next is disputed, but we accept Smith's version of events. Haroian offered her a severance package extending over six months, which Smith rejected as unacceptably short. Then, and only then, Smith claims, did Haroian offer her another position in the company -- a position on Haroian's staff with unspecified duties, coextensive with the proposed severance period. Smith interpreted Haroian's actions as termination of her employment rather than a suggestion that she be permanently reassigned; no one at Stratus ever advised her differently. The day after her meeting with Haroian, Smith cleared out her office at Stratus. A week later, she called a meeting with her staff and announced that she was leaving, without making clear to them whether she had been fired or had resigned.

During the week following her termination, Smith met with John Young and another human resources manager, Richard Marciante, to discuss her situation. Smith claims that Marciante told her that she should not be overly concerned about losing her job since her

husband was employed and could at least provide the family with one income.

Smith claims that her treatment was markedly different from that of male vice-presidents and managers whose performances were deemed unsatisfactory. Those employees, Smith claims, either received more generous severance packages than the six months offered to Smith or were offered other suitable employment within the company. In mid-July, when Smith asked Haroian why she was being treated differently from these other executives, Haroian simply shrugged. When Smith asked John Young the same question, Young told he that he had asked Haroian that question, and that Haroian had told Young that he simply thought it better to sever Smith completely.

Smith filed complaints on October 15, 1991, with both the Massachusetts Commission Against Discrimination and the Equal Employment Opportunity Commission.[1] Smith commenced this action on January 13, 1992, by filing a complaint in federal district court. In her complaint, Smith charged Stratus with illegal discrimination on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e,[2]

---

[1]Smith requested and received permission to withdraw her complaints before both these agencies and pursue a private action.

[2]Title VII of the Civil Rights Act of 1964 provides in relevant part:

> It shall be an unlawful employment practice for an employer--

violation of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), and violations of various Massachusetts laws. On October 8, 1993, the district court granted Stratus's motion for summary judgment on the federal claims, concluding that Smith had failed to adduce sufficient evidence to support a jury finding that Stratus's stated reason for dismissing her was a pretext for discrimination.[3] This appeal followed.

II.
Discussion

Smith makes two arguments on appeal. First, she argues that the district court misinterpreted the Supreme Court's holding in St. Mary's Honor Center, Inc. v. Hicks, 113 S. Ct. 2742 (1993), when it required her to adduce evidence that Stratus's stated reason for her dismissal was a pretext for discrimination. Second, Smith argues that even if the district court interpreted Hicks correctly, its grant of summary judgment should

---

> (1) . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a).

[3]The district court also ruled that there was insufficient evidence to proceed on Smith's claim under the Equal Pay Act. Smith does not contest that ruling in this appeal. The district court "remanded" Smith's state law claims to state court pending the outcome of this appeal.

nonetheless be reversed because Smith introduced sufficient evidence to show that Stratus's proffered reason for her dismissal was a pretext for discrimination. We address each argument in turn.

A. The District Court's interpretation of St. Mary's v. Hicks

When a Title VII plaintiff is unable to offer direct proof of her employer's discrimination -- as is usually the case and was so here -- we allocate the burden of producing evidence according to the now-familiar framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973). See Hicks, 113 S. Ct. at 2746. Under this framework, the plaintiff bears the initial burden of establishing a prima facie case of sex discrimination. She must show that (1) she is a member of a protected class; (2) she was performing her job at a level that rules out the possibility that she was fired for inadequate job performance; (3) she suffered an adverse job action by her employer; and (4) her employer sought a replacement for her with roughly equivalent qualifications. Mesnick v. General Elec. Co., 950 F.2d 816, 823 (1st Cir. 1991), cert. denied, 112 S. Ct. 2965 (1992). If the plaintiff successfully bears this relatively light burden,[4] we presume that the employer engaged in

---

[4]Stratus argues that Smith failed to satisfy her prima facie burden by not putting forth evidence sufficient to show that she was qualified for the position, i.e., "'that [s]he was doing [her] job well enough to rule out the possibility that [s]he was fired for inadequate job performance, absolute or relative.'" Menard v. First Sec. Serv. Corp., 848 F.2d 281,

impermissible sex discrimination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

If the employer articulates a legitimate, non-discriminatory reason for its decision, however, the presumption of discrimination vanishes, and the burden of production shifts back to the plaintiff. The plaintiff must then introduce sufficient evidence to support two additional findings: (1) that the employer's articulated reason for the job action is a pretext, and (2) that the true reason is discriminatory. Woods, 30 F.3d at 260. The plaintiff may rely on the same evidence to prove both pretext and discrimination, but the evidence must be sufficient for a reasonable factfinder to infer that the

---

285 (1st Cir. 1988) (quoting Loeb v. Textron, 600 F.2d 1003, 1012 (1st Cir. 1979)). Stratus argues that Smith's evidence of her adequate performance, consisting primarily of a dated performance evaluation, pay increases and stock options, in no way rules out the possibility that she was fired for performing inadequately at the time in question.

The plaintiff's prima facie burden in Title VII cases, however, is "not onerous." Mesnick, 950 F.2d at 823 (1991). We have interpreted the prima facie requirement at issue to mean that the plaintiff must put forth sufficient evidence to "support an inference that [the plaintiff's] job performance at the time of her discharge was adequate to meet [the employer's] legitimate needs." Keisling v. Ser-Jobs For Progress, Inc. 19 F.3d 755, 760 (1st Cir. 1994). In Keisling, we held that a plaintiff's evidence of increased responsibilities over time, positive feedback and pay increases -- evidence similar to that adduced by Smith -- satisfied this element, even though the evidence did not extend right up to the time of her discharge. We think that Smith's evidence reasonably supports the same inference, and thus we hold that she satisfied her prima facie burden.

employer's decision was motivated by discriminatory animus. See Goldman, 985 F.2d at 1117-18.

Smith argues that under Hicks, a Title VII plaintiff's burden in this final stage does not include adducing evidence that an employer's true motivation was discriminatory. In other words, Smith contends that a factfinder presented with sufficient evidence of pretext but no evidence of discrimination may always reasonably infer that the employer's true motivation was discriminatory, and that summary judgment against the plaintiff would therefore be precluded in such circumstances. Thus Smith asserts, the district court's grant of summary judgment was improper because a jury should have been permitted to infer from Smith's evidence of pretext that the true reason for her maltreatment was sex discrimination.

Smith's argument rests primarily on a passage from Hicks in which the Court noted that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Hicks, 113 S. Ct. at 2749 (emphasis added). Our recent opinion in Woods squarely addressed this issue, and we will not revisit it at length here. As stated in Woods, we interpret the above passage from Hicks as making clear

> that the Supreme Court envisioned that some cases exist where a prima facie case and the disbelief of a pretext could provide

> a strong enough inference of actual discrimination to permit the fact-finder to find for the plaintiff. Conversely, we do not think that the supreme Court meant to say that such a finding would always be permissible. . . . The strength of the prima facie case and the significance of the disbelieved pretext will vary from case to case depending on the circumstances. In short, everything depends on the individual facts.

Woods, 30 F.3d at 261 n.3. Thus, the district court interpreted Hicks correctly when it ruled that, to survive Stratus's summary judgment motion, Smith had to adduce sufficient evidence to support a finding that Stratus's stated reason was not only a pretext, but that it was a pretext for illegal sex discrimination.

B. Smith's Evidence of Discrimination

Smith's second argument is that the district court erred in ruling that she failed to introduce sufficient evidence of Stratus's discriminatory animus. Upon review of the evidence, drawing all reasonable inferences in Smith's favor, we agree with the district court.

Smith offers an abundance of evidence indicating that Stratus found her performance more than satisfactory and that, despite her concerns about working for Haroian, she heard no substantial criticism of her performance until her pre-vacation meeting with Haroian

on June 12, 1991. Even if we assume arguendo that this evidence is sufficient to support a finding of pretext, it could not, standing alone, possibly lead a reasonable jury to conclude that discriminatory animus was the real motivation behind Haroian's action. Title VII does not grant relief to a plaintiff who has been discharged unfairly, even by the most irrational of managers, unless the facts and circumstances indicate that discriminatory animus was the reason for the decision. See Mesnick, 950 F.2d at 825.

Smith does offer other evidence purporting to show discriminatory animus. More specifically, Smith alleges that Stratus's treatment of her differed from that of a number of male vice-presidents, who Smith claims, were bounced from their jobs but were afforded a much softer landing than she was offered. As we explain below, however, Smith's evidence is wholly inadequate to support these allegations in any relevant way.

In a disparate treatment case, the plaintiff has the burden of showing that she was treated differently from "persons situated similarly 'in all relevant aspects.'" The Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir. 1989) (quoting Smith v. Monsanto Chemical Co., 770 F.2d 719, 723 (8th Cir. 1985), cert. denied, 475 U.S. 1050 (1986)) (emphasis added); see also Burdine, 450 U.S. at 258 ("[I]t is the plaintiff's task to demonstrate that similarly situated employees were not treated equally"); Mack v. Great Atlantic and Pacific Tea Co., 871 F.2d 179, 182 (1st Cir. 1989) (affirming summary judgment where plaintiff failed to demonstrate that "comparably credentialed" employees received more

favorable treatment). Thus, for us to compare Smith's treatment with that of terminated or transferred male executives in a meaningful way, Smith would have to show that she was similarly situated to those men in terms of performance, qualifications and conduct, "without such differentiating or mitigating circumstances that would distinguish" their situations. Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992). This she has utterly failed to do.

First, Smith points to the treatment afforded former Stratus vice-presidents Ray Hermo and Greg Sheard. Freiburghouse testified in his deposition that, although he knew nothing about the specifics of Hermo's and Sheard's situations, he knew that their supervisors had been dissatisfied with their respective performances. Young testified in his deposition that Hermo received a severance package, and that he was "sure there were others" who received such packages. Company records indicate that Sheard continued to receive his annual salary of $126,000 for up to nine months following his last day at the company.

Smith also points to Freiburghouse's deposition testimony about Bill Murphy. According to Freiburghouse, Murphy filled a number of positions at different times at the company's request. Freiburghouse testified that Murphy, after completing his assigned task of eliminating a division of the company, was named vice-president of sales, North America Division. When asked if the company created that position for him, Freiburghouse testified that he did not know. Smith

asserts in her brief that this evidence showed that Murphy "was removed from his position, and defendant Stratus created a position for him."

Freiburghouse also testified that two other male vice-presidents, Jim Austin and Alex Lupinetti, were demoted twice to positions of lesser responsibility.

As further evidence of disparate treatment, Smith points to the case of Bill Elliot, her predecessor as marketing vice-president. Elliot became vice-president of strategic planning, a position that Haroian described as "a high level individual contributor function," with only one staff person working for him.

Smith's evidence fails to provide the factfinder with a sufficient basis on which to conclude that she was "similarly situated in all relevant aspects" to the male vice-presidents she names. Other than Freiburghouse's hearsay testimony that Sheard's and Hermo's supervisors were "dissatisfied" in some unspecified manner, we know nothing about the alleged performance problems of those two individuals or the level of dissatisfaction of their supervisors; as for the other four executives, there is no indication that their job changes were due to poor performance, nor would that be a permissible inference for a jury to make on this scant record. Thus, this sketchy evidence, lacking a sufficient foundation for a legally relevant comparison of Smith and the male executives, cannot support an inference that Smith's dismissal was motivated by discriminatory animus.

Appendix A

Smith offers three additional snippets of evidence to prove Stratus's discriminatory animus. First, Smith points to Haroian's shrug in response to her question about why she was being treated differently than a number of male managers -- a tacit admission, she claims, of disparate treatment. Next, Smith offers her recollection that Young also asked Haroian why Smith was being treated differently than male vice-presidents and was told that Haroian simply thought it better to sever Smith completely. Finally, Smith points to Marciante's comment telling her not to worry since her husband still had an income.

Haroian's shrug cannot be considered an admission of discrimination. First, in Smith's deposition testimony, she stated that she named the executives when she posed the question to Haroian -- not that she asked him why she was being treated differently from males. Thus, Haroian was not even being presented with an accusation of gender discrimination when he shrugged. Second, Haroian could have meant any number of things, or nothing at all, by his shrug; we find the shrug, under these circumstances, to be so ambiguous that it is not just "of little probative force," Menard v. First Sec. Serv. Corp., 848 F.2d at 288, but it is of absolutely no probative force whatsoever.

We find little more probative value in Haroian's statement to John Young. Even assuming that Young actually asked Haroian why Smith was being treated differently than male executives -- and not why she had not been offered another position, as Smith's attorney

suggests in a passage from Young's deposition to which Smith specifically directed our attention -- we fail to see how a reasonable jury could infer from Haroian's answer any hint of discriminatory animus.

Finally, Marciante's comment lends itself to many possible interpretations. Smith claims that the comment smacks of gender bias, denigrates the important of her career and "suggests a 'men's club' atmosphere in which women executives are viewed as dilettantes." Brief of Plaintiff/Appellant at 45. Even if we accept this far-fetched interpretation of Marciante's comment, the fact remains that Marciante was a mid-level Stratus manager who did not participate in the decision to remove Smith from her job. Smith's failure to adduce any evidence that Marciante made or influenced the decision to remove Smith from her job makes the comment irrelevant to the issue of discriminatory animus. See Medina-Munoz, 896 F.2d at 10 ("The biases of one who neither makes nor influences the challenged personnel decision are not probative in an employment discrimination case.").

In sum, we find nothing in Smith's evidence that would permit a reasonable jury to infer that discriminatory animus motivated Stratus to remove Smith from her job. Thus, there is no genuine issue as to any material fact, and Stratus is entitled to judgment as a matter of law. See Woods, 30 F.3d at 259.

Appendix A

For the foregoing reasons, the district court's grant of summary judgment is

AFFIRMED.

APPENDIX B - OPINION OF THE DISTRICT COURT (EXCERT FROM TRANSCRIPT OF HEARING ON MOTION FOR SUMMARY JUDGMENT)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

STEPHANIE SMITH,	)	CA 92-10094
Plaintiff,	)	
	)	Boston, Massachusetts
v.	)	October 8, 1993
STRATUS COMPUTERS,	)	2:30 p.m.
Defendant.	)	

HEARING BEFORE: YOUNG, D.J.

Appendix B

APPEARANCES:

FORDHAM & STARRETT
BY: LAURENCE M. JOHNSON, ESQUIRE and
ANN JOHNSTON, ESQUIRE
260 Franklin Street
Boston, Massachusetts 02110
For the Plaintiff;

HALE & DORR
BY: DAVID H. ERICHSEN, ESQUIRE and
ANNE BURNHARDT, ESQUIRE
60 State Street
Boston, MA 02109
For the Defendant.

Appendix B

The only reason we went to get an affidavit from Mr. Thompson was to show him how it was construed, and to ask him whether that was his intent. And we purposely put forward a very limited affidavit, just so he could make the record clear from his standpoint.

But that in no way raises an issue of fact.

THE COURT: I think I have the positions.

The motion for summary judgment as to the federal claims is allowed. Let me explain why and on what grounds.

In reaching this decision, the Court is very sensitive to the policy arguments made by Ms. Ann C. McGinley in Credulous Courts and Tortured Trilogy, the Improper Use of Summary Judgment in Title 7 and ADEA cases, 34 Boston College Law Review 203, 1993.

At the same time, the Court necessarily must follow the decisions as announced by the Supreme Court of the United States and the First Circuit.

The Court has, through oral argument, but not before, come to understand the plaintiff's position with respect to the interpretation to be given to the decision of the Supreme Court of the United States in Hicks. And this Court finds that an interesting interpretation, not frivolous, one that perhaps finds some support in the decision of the majority.

Appendix B

But a careful reading of that decision leads this Court to conclude that the actual holding is, as the defense argues, an adoption of the so-called Pretext Plus Rule.

Therefore, the Court makes no ruling concerning whether the plaintiff has made out a prima facie case, but for the purposes of this decision, will assume that she has.

Second, the Court makes no ruling concerning whether the defense ground for the job action was pretextural, but -- and the Court considers this significant, given the plaintiff's argument -- will assume that it is pretextural. The Court will deal only with the state of the record concerning the so-called plus element.

If Miss Smith makes out a prima facie case, and it's undisputed that there is an articulable non-discriminatory reason advanced for the job action, and if that reason is discriminatory, then the Court rules that on this record, there is insufficient evidence to take this case to the jury.

And I will be very clear about my reasoning. That poses the issue that Mr. Johnson so ably argued; that is, if I've misread Hicks -- and I don't think I have -- but if I've misread Hicks, then I've overextended myself in the summary judgment context, and we'll see.

But now to the point that I must make my rulings on: The record is insufficient to evidence disparate treatment, especially in light of the First Circuit recent decision in LeBlanc vs. Great American Insurance

Company, Civil Number 93-1050, First Circuit, December 29, 1993.

There is no foundation for the conclusory assertion, on this record, anyway, about the treatment of these other individuals, nor is there sufficient evidence that this treatment is such as would establish a pattern of gender-based discrimination, having in mind the undisputed evidence concerning who replaced Miss Smith and how she was paid and how she was treated.

Mr. Marciante -- the clerk says I said December 29, 1993, as the date of that decision, and if I did, I misspoke. I meant September 29, 1993, and I thank the clerk.

Going on, I don't think Mr. Marciante had anything to do with her dismissal -- I don't mean that in a sense that it's not what I think; I can't make the finding.

I rule that on this record, there is no sufficient evidence that he had anything whatsoever to do with the job action, and the statement is equivocal at best. I am not clear that that's a statement of gender-based discrimination. Especially in this age of working couples where both work. The statement is rather one that is equally construed to be divisive as to between those who have only one member of the family working and those who have both members.

With respect to the various Thompson affidavits, I simply don't think that those affidavits, drawing all

inferences in favor of the plaintiff, can be construed to support a gender-based discrimination.

So on that narrow issue, I rule that there is no sufficient evidence of pretext under the cases -- strike that -- no sufficient evidence of gender-based discrimination under the controlling cases to take this case to the jury or, in other words, to raise a genuine issue of material fact which the jury needs to resolve.

In view of the undisputed evidence, the status of the pay accorded to the person who was hired, female person who was hired to replace Smith, and her salary and the like, there is no sufficient evidence of any violation of the Equal Pay Act of 1963.

I know that the defendants would like me to go on and deal with the pendant state claims. I don't do that. Where the federal claims are resolved prior to trial, the state claims will be remanded.

And they are hereby remanded -- what is the proper venue in this state, Suffolk?

THE CLERK: Middlesex, Your Honor.

THE COURT: Middlesex?

The state claims are hereby remanded to the Massachusetts Superior Court sitting in and for the County of Middlesex.

Appendix B

The parties may draft a brief judgment that takes care of those two, and we'll go from there. And that's the order of the Court. Thank you.

MR. ERICHSEN: Thank you, Your Honor.

MR. JOHNSON: Thank you, Your Honor.

(Proceeding concluded.)